

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL D. CAMARENA,

Petitioner,

v.

MATTHEW CATE, Director,
Respondent.

NO. EDCV 10-636-DDP (AGR)

ORDER TO SHOW CAUSE

On April 29, 2010, Petitioner filed a Petition for Writ of Habeas Corpus by a Person in State Custody ("Petition") pursuant to 28 U.S.C. § 2254. For the reasons discussed below, it appears that the one-year statute of limitations has expired.

The Court, therefore, orders Petitioner to show cause, on or before **June 7, 2010**, why this Court should not recommend dismissal with prejudice based on expiration of the one-year statute of limitations.

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I.

PROCEDURAL BACKGROUND

On December 3, 1991, Petitioner was sentenced to 15 years to life plus a consecutive two years after being convicted by a jury of second degree murder. The jury found true that Petitioner personally used a shotgun, but found not true that Petitioner personally used a handgun. (Petition at 2; Opinion at 1-2.¹) The California Court of Appeal affirmed the judgment on July 15, 1993. (Petition at 3; Opinion at 19.) The California Supreme Court denied the petition for review on October 13, 1993. (Petition at 3 & Exh. A, Appendix B.)

On November 19, 1993, Petitioner filed a state habeas petition before the San Bernardino Superior Court. The court conducted a hearing at which witnesses testified. On August 8, 1994, the Superior Court denied the state habeas petition. (Petition at 4 & Exh. B at 1-2.)

Petitioner states that he filed a state habeas petition before the California Court of Appeal, Fourth Appellate District, Division Two on January 18, 1995. (Petition at 4.) According to the online docket, Petitioner filed a state habeas petition on December 23, 1992, which was denied on December 30, 1992. (Case No. E012067.) Petitioner filed another state habeas petition on February 6, 1995, which was denied on February 22, 1995. (Case No. E015666.)

In March 2009, Petitioner filed a motion for modification of sentence under Cal. Penal Code § 1260. (Petition at 4.) On April 17, 2009, the San Bernardino Superior Court denied the motion. (Exh. C to Petition.)

On July 1, 2009, Petitioner filed a state habeas petition before the San Bernardino Superior Court. (Petition at 4i.) The court denied the petition as untimely on July 6, 2009. (Exh. D to Petition.)

¹ The California Court of Appeal's opinion is located at Appendix A, which is part of Exhibit A to the Petition.

1 On August 4, 2009, Petitioner filed a state habeas petition in the Court of
 2 Appeal, which denied it on August 10, 2009. (Petition at 4i; Exh. E to Petition,
 3 Case No. E048941.)

4 On September 10, 2009, Petitioner filed a state habeas petition in the
 5 California Supreme Court. (Petition at 4i.) On March 10, 2010, the California
 6 Supreme Court denied the petition with a citation to *In re Robbins*, 18 Cal. 4th
 7 770, 780 (1998). (Exh. F to Petition; *In re Michael Camarena*, 2010 Cal. LEXIS
 8 2467 (2010).)

9 On April 26, 2010, Petitioner signed the Petition before this court. (Petition
 10 at 8.) Petitioner asserts four grounds: (1) insufficient evidence, prosecutorial
 11 misconduct “by the use of an improper theory, jury misdirection and the
 12 suppression of materials (proper law) given to the jury” and improper jury
 13 instructions (Petition at 5 & a.II-a.III); (2) ineffective assistance of counsel in that
 14 “counsel failed to use law and evidence to defend and reinstate Petitioner’s
 15 violated rights suffered at trial” and “improperly advised and influenced Petitioner
 16 causing default to state grounds for relief” (Petition at 5, b.I-b.XIX.); (3)
 17 sentencing error, instructional error and ineffective assistance of counsel (Petition
 18 at 6, c.1-c.11); and (4) inability to pay restitution (Petition at 6, d.1-d.5).

19 II.

20 STATUTE OF LIMITATIONS

21 The Petition was filed after enactment of the Antiterrorism and Effective
 22 Death Penalty Act of 1996 (“AEDPA”). Therefore, the Court applies the AEDPA
 23 in reviewing the petition. *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059,
 24 138 L. Ed. 2d 481 (1997).

25 The AEDPA contains a one-year statute of limitations for a petition for writ
 26 of habeas corpus filed in federal court by a person in custody pursuant to a
 27 judgment of a state court. 28 U.S.C. § 2244(d)(1). The one-year period starts

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1 running on the latest of either the date when a conviction becomes final under 28
2 U.S.C. § 2244(d)(1)(A) or on a date set in § 2244(d)(1)(B)-(D).

3 **A. The Date on Which Conviction Became Final**

4 The California Supreme Court denied the petition for review on October 13,
5 1993. (Petition at 3 & Exh. A, Appendix B.) His conviction became final ninety
6 days later, on January 11, 1994. *Bowen v. Roe*, 188 F.3d 1157, 1158-59 (9th Cir.
7 1999). Because the conviction became final before the AEDPA was enacted,
8 Petitioner had until April 24, 1997, to file a federal habeas petition. *Laws v.*
9 *Lamarque*, 351 F.3d 919, 921 (9th Cir. 2003). Petitioner signed his federal
10 habeas petition on April 26, 2010, 13 years later. (Petition at 8.) The Petition is
11 time-barred unless the statute of limitations was tolled.

12 The statute of limitations is tolled during the time “a properly filed
13 application for State post-conviction or other collateral review with respect to the
14 pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). However, the
15 statute of limitations is not tolled during the interval between the time a conviction
16 becomes final on direct review and the time the first state habeas petition is filed
17 because there is no case “pending” during that interval. *Thorson v. Palmer*, 479
18 F.3d 643, 646 (9th Cir. 2007).

19 Petitioner’s state habeas petitions during the period 1992-1995 occurred
20 before the statute of limitations began running and do not toll the statute of
21 limitation. After the statute of limitations began to run, Petitioner filed a motion for
22 modification of sentence in March 2009, which was denied on April 17, 2009.
23 (Petition at 4 & Exh. C.) Even assuming such motion could toll the statute of
24 limitation, it was filed almost 12 years after the statute of limitations had expired.
25 A state habeas petition filed after the limitations period has expired does not toll
26 or revive the expired limitations period. *Welch v. Carey*, 350 F.3d 1079, 1081-84
27 (9th Cir. 2003).

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1 **B. Equitable Tolling**

2 The Supreme Court has not decided whether § 2244(d) allows for equitable
 3 tolling. *Lawrence v. Florida*, 549 U.S. 327, 127 S. Ct. 1079, 1085, 166 L. Ed. 2d.
 4 924 (2007). Even assuming equitable tolling applies, Petitioner bears the burden
 5 of showing “(1) that he has been pursuing his rights diligently, and (2) that some
 6 extraordinary circumstance stood in his way and prevented timely filing.” *Id.* The
 7 extraordinary circumstances must have been the cause of his untimeliness. *Pace*
 8 *v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005).
 9 “[T]he threshold necessary to trigger equitable tolling [under AEDPA] is very high,
 10 lest the exceptions swallow the rule.” *Miranda v. Castro*, 292 F.3d 1063, 1066
 11 (9th Cir. 2002).

12 Petitioner’s ignorance of the law is not a basis for equitable tolling.
 13 *Rasberry v. Garcia*, 448 F.3d 1150, 1154 (9th Cir. 2006). To explain his delay,
 14 Petitioner argues that, on October 16, 1993, his appellate counsel on direct
 15 appeal advised him in a letter that “I do not see any evidence of ineffective
 16 representation by Mr. Bristoll.” Counsel went on to say that “This is my view of
 17 the issue. You may, however, raise it in a habeas petition.” (Petition at a.V &
 18 Exh. G, Appendix A.) Petitioner “fully acknowledge[s] she did not discourage me
 19 from taking that line. But great weight was given to her opinion.” (Declaration
 20 and Statement of Petitioner dated 9/4/09 at 3-4 (“Declaration”), Exh. G to
 21 Petition.) The opinion of appellate counsel regarding Petitioner’s ineffective
 22 assistance claim does not warrant equitable tolling, “particularly in the
 23 postconviction context where prisoners have no constitutional right to counsel.”
 24 *Lawrence*, 549 U.S. at 336-37 (counsel’s mistake in miscalculating limitations
 25 period); *Miranda*, 292 F.3d at 1068 (“because Miranda had no right to the
 26 assistance of his appointed appellate counsel regarding post-conviction relief, it
 27 follows that he did not have the right to that attorney’s ‘effective’ assistance,
 28 either”).

Petitioner cites *Townsend v. Knowles*, 562 F.3d 1200 (9th Cir. 2009). (Petition at a.V.) However, *Townsend* has no application to Petitioner's case. In *Townsend*, the petitioner argued for equitable tolling because an intervening change in the law² rendered his pending petition untimely. *Id.* at 1205-06. These circumstances are not presented here.³

C. Date of Discovery – 28 U.S.C. § 2244(d)(1)(D)

In the context of an ineffective assistance claim, the statute of limitations starts to run on the date a petitioner discovered (or could have discovered) the factual predicate for a claim that his counsel's performance was deficient, or on the date a petitioner discovered (or could have discovered) the factual predicate for prejudice, whichever is later. See *Hasan v. Galaza*, 254 F.3d 1150, 1155 (9th Cir. 2001). Therefore, the statute of limitations begins to run on "the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2244(d)(1)(D).

"Time begins when the prisoner knows (or through diligence could discover) the important facts, not when the prisoner recognizes their legal significance." *Hasan*, 254 F.3d at 1154 n.3.

Petitioner has not identified any factual predicates that he discovered after the date his conviction became final. Petitioner relies exclusively on facts developed at trial in 1991 and the evidentiary hearing in 1994: the jury verdict, the prosecutor's argument, the jury instructions, the medical examiner's testimony, the autopsy, the Court of Appeal opinion on direct appeal, the Information, and testimony at the evidentiary hearing. (Petition at a.VI-a.XXXI, b.I.) Petitioner acknowledges that he "was aware of the issues at question in my case but not

² The intervening change in the law was *Pace v. DiGuglielmo*, 544 U.S. 408, 125 S. Ct. 1807, 161 L. Ed. 2d 669 (2005).

³ Petitioner argues there is no procedural bar. (Petition at a.V.) However, the question is whether the limitations period is tolled, not whether there is a procedural bar.

1 aware the form in which counsel had presented them to the court was insufficient
2 and fell short and not fully exhausted.” (Declaration at 6; *Id.* at 9 (“the issues
3 were presented though improperly”). Therefore, the Petition is barred by the
4 statute of limitations.


5 **III.**

6 **ORDER TO SHOW CAUSE**

7 IT IS THEREFORE ORDERED that, on or before ***June 7, 2010***, Petitioner
8 shall show cause, if there be any, why this Court should not recommend
9 dismissal with prejudice of the Petition based on expiration of the one-year
10 statute of limitations. Petitioner’s response must explain why the Petition is not
11 barred by the statute of limitations.

12 ***Petitioner is also advised that if he fails to timely respond to this***
13 ***Order to Show Cause, the Magistrate Judge will recommend that the***
14 ***District Court dismiss the Petition, with prejudice, based on expiration of***
15 ***the one-year statute of limitations.***

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17 DATED: May 6, 2010

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19 ALICIA G. ROSENBERG
20 United States Magistrate Judge
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